Office-Supreme Court, U.S.
FILED
NOV 28 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-364

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEPHEN GIBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court, in finding that there was a sufficient evidentiary basis for admission of co-conspirator statements against petitioner under Fed. R. Evid. 801(d)(2)(E), properly relied on the presumption that a conspirator's membership continues in the absence of evidence of withdrawal.

2. Whether the Confrontation Clause was violated by admission of co-conspirator statements under Rule 801(d)(2)(E).

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OPINION BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-44a) is reported at 739 F.2d 838.

JURISDICTION

The judgment of the en banc court was entered on June 15, 1984. A petition for rehearing was denied on July 11, 1984 (Pet. App. 47a). The petition for a writ of certiorari was filed on September 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846. He was sentenced to a term of ten years' imprisonment.

The evidence at trial is detailed in the opinion of the court of appeals (Pet. App. 3a-9a). Petitioner did not dispute that in 1980 Joseph Quintiliano (Quintiliano) headed a conspiracy to import marijuana into the United States from Colombia with the intent to distribute it. Other members of the conspiracy were Quintiliano's brother Jerry, Prentiss Breland, Michael O'Lonney, Alejandro Rizo, Charles Bilella, and David White.[1] In March 1980, Quintiliano paid $40,000 for a Beechcraft airplane to transport marijuana from Colombia to Pennsylvania. Between April and September 1980, the conspirators repaired the plane, equipped it for smuggling, and took it on several test flights. In late September, Breland flew the plane from Pennsylvania to Florida, and on October 4 he flew it from Florida to Colombia. On October 5, Breland was arrested a few hours after landing in Florida for refueling en route back to Pennsylvania. The plane was searched, and more than $400,000 worth of marijuana was seized. Pet. App. 3a-4a.

There was evidence showing that petitioner participated in the conspiracy as the intended purchaser of the marijuana. The evidence linking petitioner to the conspiracy fell into three categories. First, surveillance showed that on April 7, 1980, petitioner traveled to the Philadelphia area for a meeting with Quintiliano. Petitioner flew to Philadelphia and was met by David White, who then flew him to meet Quintiliano at a suburban airport. Surveillance officers testified that Quintiliano met petitioner at the airport and drove him to a restaurant where other conspiracy meetings occurred. After conversing privately, Quintiliano and petitioner went to another airport where the Beechcraft was located, and together they inspected the plane. They were

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[1]Rizo was tried and convicted with petitioner. The trial of Breland was severed, and the other conspirators pleaded guilty to the indictment (Pet. App. 3a n.1).

followed from the airport by officers who observed them looking around in an apparent effort to detect surveillance. Quintiliano also engaged in several evasive driving maneuvers. Pet. App. 5a.

The second category of evidence consisted of statements made by Quintiliano. Bilella and White testified that in the spring of 1980, when Quintiliano purchased the Beechcraft, he stated that he planned to sell the marijuana to a customer named "Jake" with whom he had dealt before. On April 6, 1980, the day before petitioner's visit to the Philadelphia area, Quintiliano told White that "Jake" was growing impatient and was coming for a visit the next day to see the preparations first-hand. White testified that the following day he went to Philadelphia and met petitioner, who identified himself as "Jake" and matched the description of "Jake" given by Quintiliano. Pet. App. 5a-6a. Bilella gave similar testimony, stating that in early October, Quintiliano told him that he had made arrangements to sell the marijuana to people from Florida who had offered more money than "Jake." Pet. App. 6a.

White and Bilella also testified to a series of events at Quintiliano's home on October 4, 1980. Bilella stated that while in Quintiliano's home early that evening, he heard Rizo and Quintiliano discussing the sale of the marijuana to buyers from Florida. Quintiliano became dissatisfied because the Floridians were unable to pay cash in advance. Quintiliano stated that he had telephoned "Jake" to see if he would buy the marijuana and that "Jake" had agreed to "try to make the necessary arrangements." Pet. App. 6a & n.5.

White also testified regarding Quintiliano's account of a telephone call to "Jake" in which "Jake" reportedly agreed to buy the marijuana but needed time to obtain the necessary funds. White further stated that he heard Quintiliano instruct his brother Jerry to call "Jake" from a pay phone.

Quintiliano asked White for permission to store the marijuana in his shop until "Jake" got the money, and at about 12:30 a.m. on October 5, White, Quintiliano, and other conspirators met at White's shop to clear storage space for the marijuana. Pet. App. 7a-8a.

The third category of evidence consisted of telephone records showing long distance calls made from Quintiliano's house in Pennsylvania to petitioner's home in Massachusetts and to his electronic paging service. Many of these calls corresponded closely to the dates and times of important events in the conspiracy. Pet. App. 8a-9a.

2. On appeal, petitioner argued that the district court had erred in admitting Quintiliano's out-of-court statements to White and Bilella under the exemption from the hearsay rule for co-conspirator statements (Fed. R. Evid. 801(d)(2)(E)). Petitioner asserted that there was insufficient independent evidence to establish either that he was a member of the conspiracy at the time the statements were made or that the statements were made in furtherance of the conspiracy, as Rule 801(d)(2)(E) requires. In addition, he argued that admission of the statements violated the Confrontation Clause because the government had failed to establish that the statements were reliable and that Quintiliano was unavailable to testify at trial.

A panel of the court of appeals initially reversed petitioner's conviction, but the court granted rehearing en banc and affirmed his conviction. The en banc court concluded that "the district court did not err in its determination that the Government met its burden of establishing by a preponderance of independent evidence that [petitioner] was involved in the conspiracy at the time of Quintiliano's statements" and that these statements were made in furtherance of the conspiracy (Pet. App. 15a-17a). The court noted (Pet. App. 12a-13a) that the suspicious circumstances of petitioner's

April 1980 visit with Quintiliano—"the principal conspirator"—"permit[ted a reasonable inference of [his] complicity in the enterprise then under way." With respect to petitioner's continued involvement in the conspiracy six months later, when most of the co-conspirator declarations in issue were uttered, the court held that "[b]ecause there [was] no evidence that [petitioner] withdrew from the [on-going] conspiracy after April, his involvement may be deemed to have continued until October" (*id.* at 14a-15a (footnote omitted)).

Turning to petitioner's Confrontation Clause argument, the court held that petitioner had waived the issue of unavailability by failing to make a timely objection at trial, thereby preventing the government from correcting any defect by calling Quintiliano to testify or demonstrating his unavailability. The court noted (Pet. App. 17a n.21) that the only argument made by petitioner challenging the reliability of the evidence was that "Quintiliano had reason to, and did, fabricate [petitioner's] involvement in the conspiracy." The members of the majority disagreed on the question whether co-conspirator statements must satisfy an independent test o reliability, but the court stated that all members of the majority agreed that the statements were sufficiently reliable to satisfy any such test (*ibid.*).[2]

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[2]Judge Rosenn, joined by Judges Aldisert and Gibbons dissented. Judge Rosenn argued that petitioner's conviction should be reversed on Confrontation Clause grounds because it rested largely on "untested, devastating hearsay" and the government "failed to establish * * * that the declarant [Quintiliano] cannot be produced for trial" (Pet. App. 36a, 42a). He concluded that this issue "was timely raised, even if the objection came at the close of the Government's case" and, in any event, was reviewable under the plain error rule (*id.* at 41a-42a). Chief Judge Seitz, in a separate dissent, "would [have] vacate[d] and remand[ed] to afford the government an opportunity to discharge its burden of showing that Quintiliano was unavailable at the time of the trial" and for the district court's determination of the trustworthiness issue (*id.* at 42a-43a).

ARGUMENT

1. Petitioner first argues (Pet. 9-16) that the court of appeals erred in relying on a presumption of his continuing involvement in the conspiracy to justify the admission against him under Fed. R. Evid. 801(d)(2)(E) of certain co-conspirator statements. This argument is without merit.[3] "A party may renounce a conspiracy before its termination, and statements made thereafter by other conspirators are not within the exception when offered against him. But the party's participation in the conspiracy, once shown, is presumed to continue, and absent affirmative conduct on his part to get out, he will be deemed to continue to be a member of the endeavor for purposes of the exception." 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 340 (1980) (footnote omitted). See also *United States* v. *Xheka*, 704 F.2d 974, 986 (7th Cir. 1983), cert. denied, No. 83-338 (Nov. 28, 1983); *United States* v. *Hamilton*, 689 F.2d 1262, 1268-1269 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983).[4]

Petitioner appears to accept the validity of the presumption of continuing membership in a conspiracy to prove that a person is guilty of the crime of conspiracy or of substantive offenses committed by co-conspirators (see Pet. 14-16). But petitioner argues (Pet. 16 (footnote omitted)) that "importation of a concept of substantive conspiracy law

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[3]None of the dissenting judges below accepted this argument (see Pet. App. 30a n.4).

[4]Contrary to petitioner's claim (Pet. 11), *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979), has no bearing whatever on this case. The discussion in that case on which petitioner relies (see 442 U.S. at 166 n.28) is confined to "criminal statutory presumption[s]" such as the state statute involved in *Allen* providing that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle. A presumption not strong enough to prove guilt of a criminal offense may be more than sufficient with respect to a preliminary question regarding the admissibility of evidence. See Fed. R. Evid. 104(a).

into the evidentiary rule is unwarranted and unfair." However, logic dictates that if the presumption may be employed in assessing guilt (which requires proof beyond a reasonable doubt by competent evidence), then surely the same presumption may be used in considering a preliminary question of admissibility (see Fed. R. Evid. 104(a)).

Petitioner suggests (Pet. 11-14) that the passage of several months during which he was not shown to have committed any overt acts in furtherance of the conspiracy was sufficient to prove that he withdrew. It is hornbook law, however, that the mere passage of time is not sufficient to show withdrawal from a conspiracy the object of which may take some time to accomplish. See, *e.g.*, *United States* v. *Basey*, 613 F.2d 198, 202 (9th Cir. 1979), cert. denied, 446 U.S. 919 (1980); *United States* v. *Blackshire*, 538 F.2d 569 (4th Cir.), cert. denied, 429 U.S. 840 (1976). Certainly drug conspiracies like the one in this case are often of considerable duration.

Finally, petitioner claims (Pet. 11-14) that certain of the co-conspirator statements proved his withdrawal. This argument is also without merit. It is well-established that withdrawal from a conspiracy requires "affirmative action * * * to disavow or defeat" the conspiracy's purpose. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). Accord, *United States* v. *Boyd*, 610 F.2d 521, 523 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980); *United States* v. *James*, 609 F.2d 36, 41 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); *United States* v. *Pearson*, 508 F.2d 595, 597 (5th Cir.), cert. denied, 423 U.S. 845 (1975). The co-conspirator statements on which petitioner relies do not show that he took any such affirmative action. At most, they suggest that he was outbid—temporarily and perhaps without his knowledge—by another buyer. Moreover, subsequent evidence established petitioner's continued membership. Telephone toll records showed a flurry of telephone calls from Quintiliano to petitioner and his paging service in September and

October 1980 on dates corresponding to significant events in the drug importation scheme. Co-conspirator statements made by Quintiliano in October also confirmed petitioner's continued role as the intended purchaser of the marijuana. If petitioner may rely on co-conspirator statements to show withdrawal, the government, having already established the existence of the conspiracy and petitioner's membership in it, should be permitted to rely on co-conspirator statements to refute such a claim of withdrawal. While most courts of appeals, including the court below, require independent proof of the existence of a conspiracy before permitting admission of co-conspirator statements, the Federal Rules of Evidence generally allow reliance on hearsay with respect to preliminary questions of admissibility (Rule 104(a)). When a defendant relies on co-conspirator statements to show withdrawal from the conspiracy, there are no grounds for precluding the government's reliance on similar statements to refute that showing.[5] Prohibiting such reliance would lead to manifest unfairness by allowing, for example, admission of only one-half of a conversation in which two co-conspirators disputed whether another member of the conspiracy had withdrawn.

2. Petitioner also contends that admission of co-conspirator Quintiliano's out-of-court statements under the co-conspirator exemption violated the Confrontation Clause as construed in *Ohio* v. *Roberts*, 448 U.S. 56 (1980). This argument has no merit.

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[5]As noted, most of the courts of appeals, including the court below in this case, require independent evidence of the existence of a conspiracy before admitting co-conspirator statements. See *United States* v. *Arnott*, cert. denied, No. 82-2028 (Oct. 31, 1983) (White, J., dissenting from denial of certiorari). If correct, this rule must be an exception to Fed. R. Evid. 104(a), which expressly allows reliance on hearsay in making decisions regarding preliminary questions of admissibility. Assuming this exception is valid, there is no cause for extending it to encompass the separate issue of withdrawal.

a. The court of appeals correctly concluded (Pet. App. 19a) that petitioner failed to preserve this claim at trial and consequently could not raise it on appeal. Fed. R. Evid. 103(a)(1). As the court noted (Pet. App. 18a), petitioner objected to the statements only on the ground that the government had failed to establish an evidentiary predicate for their admission under Rule 801(d)(2)(E); the Confrontation Clause issue "was never raised by [him] during trial" (Pet. App. 19a). By failing to raise this claim at trial, petitioner deprived the government of the opportunity to cure any defect, such as by calling Quintiliano to testify or showing his unavailability. Petitioner makes no effort to show that a proper, timely objection was made at trial, thereby apparently conceding this dispositive issue.

b. In any event, petitioner's Confrontation Clause claim lacks merit. In *Ohio* v. *Roberts, supra*, the Court rejected a Confrontation Clause challenge to the admission of testimony given at a preliminary hearing. The Court stated (448 U.S. at 65) that "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." First, the Court stated (*ibid.*), the prosecution must sometimes demonstrate that the declarant is unavailable as a witness, although the Court added (*id.* at 65 n.7) that "[a] demonstration of unavailability * * * is not always required." Second, the Court observed (*id.* at 65-66), the Confrontation Clause contains a requirement that the evidence be reliable; but the Court noted (*id.* at 66) that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." The statements in this case were admissible under *Roberts*.

Neither *Roberts* nor any other decision of this Court conditions the admission of co-conspirators' statements upon a showing that the declarant is unavailable as a witness or that his statements are reliable for reasons in addition to the fact that they fall within Fed. R. Evid.

801(d)(2)(E). A number of courts of appeals have held that statements falling within the co-conspirator exemption from the hearsay rule automatically satisfy Confrontation Clause standards. See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), certs. denied, 455 U.S. 1005 and 457 U.S. 1136 (1982); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), cert. denied, No. 82-1069 (Nov. 7, 1983); *United States* v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). See also Pet. App. 18a n.21. These cases are correct.

First, we see no reason to assume that the Confrontation Clause requires proof of the declarant's unavailability before co-conspirator statements are admitted. The only support for this proposition is dictum taken wholly out of context from *Ohio* v. *Roberts*, 448 U.S. at 65. As noted, however, *Roberts* also made clear that a "demonstration of unavailability, however, is not always required" (*id.* at 65 n.7). Indeed, the Federal Rules of Evidence promulgated by this Court contain no fewer than 23 specific types of hearsay that are admissible "even though the declarant is available as a witness" (Fed. R. Evid. 803). By contrast, there are only four types of hearsay—including the type at issue in *Roberts* and *Dutton* v. *Evans*, 400 U.S. 74 (1970) (former testimony)—where unavailability is required (Rule 804). The exceptions to the hearsay rule in Fed. R. Evid. 803 and 804 embody the thinking and experience of generations of judges, legislators, scholars, and practitioners and are based on considerations quite similar, if not identical, to those that would inform any Confrontation Clause inquiry. If the Confrontation Clause is not violated by the 23 specific

hearsay exceptions in Rule 803, then it is hard to see why the co-conspirator exemption, which likewise does not require proof of unavailability, is not constitutional as well. Conversely, if proof of a declarant's unavailability is a general prerequisite for admission of hearsay, then most of the federal hearsay rule is unconstitutional.

For similar reasons, we do not think that co-conspirator statements must meet a separate test of reliability. As *Ohio* v. *Roberts*, 448 U.S. at 66 observed, statements falling within time-honored exceptions to or exemptions from the hearsay rule are presumptively reliable enough for admission. Nothing would be gained by reexamining these exceptions under the rubric of the Confrontation Clause. Merely invoking the name of the Confrontation Clause would not produce any new insights on these old questions. And the suggestion that the reliability of statements must be judged on a case-by-case basis, using a complex multi-factor test, with de novo appellate review of the issue of reliability, would make a shambles of trial proceedings.

It is true that some courts of appeals, including the court below, have stated that just such a case-by-case analysis is required to determine whether the co-conspirator-declarant is unavailable and, if so, whether his statements are reliable. See, *e.g.*, *United States* v. *Inadi*, No. 83-1882 (3d Cir. Nov. 13, 1984); *United States* v. *Ordonez*, 737 F.2d 793 (9th Cir. 1983); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); *United States* v. *Snow*, 521 F.2d 730, 734 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). These cases raise an important question on which review by this Court may eventually be warranted, but this case is not an appropriate

vehicle to resolve any conflict on this issue due to petitioner's failure to make a timely Confrontation Clause objection.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]This case is especially unsuitable for resolution of the conflict because it comes from one of the circuits that has taken a position favorable to the defendant on this issue, but nevertheless found it inappropriate to reverse here. Those circuits that require a separate Confrontation Clause inquiry generally judge reliability based on four factors derived from *Dutton* v. *Evans*, 400 U.S. at 88-89. They are (*United States* v. *Ammar*, 714 F.2d at 256, quoting *United States* v. *Perez*, 658 F.2d 654, 661 (9th Cir. 1981)):

> (1) [W]hether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

We note that Quintiliano's statements met this test. For the most part, the statements related to ongoing or future drug-related activities, and there was no real question that Quintiliano knew petitioner, having met with him and telephoned him. In addition, the evidence showed that Quintiliano's statements were uttered spontaneously and were clearly contrary to his own penal interests. Thus, it is no surprise that "all the members of the [court of appeals'] majority [were] in agreement that the [*Ohio* v.] *Roberts* reliability requirement, if preserved for appeal, was satisfied in this case" (Pet. App. 18a n.21).